

**Selected Documents from Claim File**

**Claim No. LRF-2000-0713-01**

Claim Amt. : \$10,461.10 Initial Entry Date : 07/17/2000

Claimant : TBP Construction, Inc.

Property Desc. : See Comments

Property Addr. : 132 Aspen Loop

Garden City, UT 84028

STATUS : DENIED (NO QUALIFIED BENEFICIARY)

Comments Page: 001 UserID: ewebster

Lot 32, Sweetwater Park Subdivision #1.

Parcel # 36-05-01-032

## Associated Addresses

Type : Claimant Legal Counsel

DOPL # : - -

Firm Nm : Kirton &amp; McConkie

Name : Bryan H. Booth

PO Box 45120

Salt Lake City, UT 841450120

(801) 328-3600

Type : Claimant Address

DOPL # : 00-373183-5501

Firm Nm : TBP Construction, Inc.

Name : Troy Peterson

PO Box 186

Garden City, UT 840280186

(435) 946-8844

Type : Home Owner - Primary

DOPL # : - -

Firm Nm :

Name : Symco Enterprises, LLC

c/o Gary Symkoviak

2385 Creek Road

Sandy, UT 84093

(801) 943-8521

Type : Non-Paying Party Legal Counsel

DOPL # : - -

Firm Nm : McKay Burton &amp; Thurman

Name : William T. Thurman

10 E South Temple Ste 600

Salt Lake City, UT 841331192

(801) 521-4135

Type : Non-Paying Party - Primary

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DOPL # : 00-231144-5501

Firm Nm : All Seasons Cabins, Inc.

Name : John Horn

1476 S 700 W

Salt Lake City, UT 841041604

( ) -

Type : Non-Paying Party - Secondary

DOPL # : 00-231144-5501

Firm Nm : All Seasons Cabins

Name : John Horn

4614 Creek View Cir

Salt Lake City, UT 841073918

( ) -

Type : Original Contractor/Developer

DOPL # : 00-231144-5501

Firm Nm : All Seasons Cabins

Name : John Horn

1476 S 700 W

Salt Lake City, UT 841041604

( ) -

#### DEMOGRAPHIC INFORMATION

Claim #: LRF-2000-0713-01 Claimant: TBP Construction, Inc.

DOPL Licensee: yes

Entity Type: Corporation

Number of Employees: 10-19

Gross Annual Revenue: 250K-499K

Years In Business: 5-9

Claiming Capacity: Subcontractor

#### NON-PAYING PARTY

DOPL Licensee: yes

Entity Type: ?

#### ===== CLAIMS PROCESSING INFO =====

	Date Recieved	Date Forwarded
Front Desk	07/13/2000	
LRF Special-Setup,Filing,CRIS	07/17/2000	
Permissive Party Response	08/13/2000	DEADLINE*****
Screen C/D Letter	08/15/2000	

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Conditional denial letter sent August 15, 2000 with response deadline of September 14, 2000.

Reasons for Conditional Denial:

1. Claim filed 121 days after judgement entry
2. Claimant is a contractor and was not licensed when qualified services were performed.
3. Incident residence is owned by an LLC not a person
4. No evidence in support of post-judgement attorney fees

Claimant Response C/D Letter	09/14/2000	09/14/2000
Comments	Page: 001	UserID: ewebster
Claimant provided timely response to conditional denial letter.		
Substantive Review	09/25/2000	
Comments	Page: 001	UserID: ewebster
Claimant is not a qualified beneficiary. Claimant became licensed as a contractor after completing all qualified services on the incident residence. Claim is denied for this reason.		
Claim has other possible deficiencies (i. e. incident residence may or may not be owner-occupied). These issues are not addressed in the denial order because of the impact they could have on other pending claims. Denying only on the clear-cut issue of qualified beneficiary.		
Claim Disposition	Deny	
Board Disposition		***
<b>JURISDICTIONAL CHECKLIST =====</b>		
Completion Of QS	07/21/1999	
Civil Bkcy Filing	11/22/1999	
Difference	124	
Comments	Page: 001	UserID: ewebster
Qualified services date per Notice of Mechanic's Lien		
Civil action filing date per Circuit Court date stamp on complaint		
Civil Judg/Bkcy Filing	03/14/2000	
LRF App Filing	07/12/2000	
Difference	120	
Comments	Page: 001	UserID: ewebster
Judgement entry date per judge's signature		
Claim filing date per DOPL date stamp		
Page: 3		
<b>===== COMPLETE APPLICATION CHECK-LIST =====</b>		
Form Submitted	Yes	07/13/2000
Form Completed	Yes	07/13/2000
Fee	Yes	07/13/2000 0000-07-6180 ICN
Signed Cert/Aff	Yes	07/11/2000
Cert of Service	Yes	07/12/2000
Demog. Questionnaire	Yes	07/13/2000

===== SUPPORTING DOCUMENTS =====

Written Contract	Yes	Written Contract	04/26/1999
Licensing Statute	Yes	License	11/02/1995
Full Payment	Yes	Affidavit Ind/Evidence	07/26/1999
Civil Action/Bankrupt	Yes	Complaint	11/22/1999
Entitlement to Pmt.	Yes	Civil Judgment	03/14/2000
Exhaust Remedies	Yes	SO/RS/WE/RE	04/11/2000

===== REQUIRED FACTUAL FINDINGS CHECK-LIST =====

Claimant Qualified Beneficiary No

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Claimant performed qualified services during the period June 15, 1999 and July 21, 1999. Claimant's contractor license was issued July 28, 1999. Claimant asserts it was using Michael Madsen's license prior to July 28, 1999. However, per Utah Code Ann 58-55-501(10) doing so would constitute unlawful conduct.

Written contract exists Yes

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Claimant provided complete copy of contract executed between Homeowner and Original Contractor. Contract is for construction of an addition an existing residence. Contract was signed by all required parties April 26, 1999.

Original Contractor Licensed Yes

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Original Contractor was issued license 231144-5501 November 2, 1995. That license was active & in good standing until January 28, 2000 when it expired for involuntary dissolution of the corporate entity.

Owner PIF to Contractor Yes

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Claimant provided copies of payment checks issued by Homeowner to Original Contractor. Total of payment checks is equal to contract price. All checks were deposited by Original Contractor.

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Residence Own/Occ as defined Bd

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Residence is owned by SYMCO Enterprises, LLC--a Utah limited liability company. The Division has always held that a homeowner must be a natural person because a legal fiction cannot physically inhabit the residence. Claimant asserts the following response to the Division's position:

"In your Notice, you state that '[p]ursuant to Utah Code Ann. 28-11-101(13) (sic--should be 38-11-102(13)) a homeowner must be a person not a legal entity.' This is incorrect. The word 'person' is not defined in the Act. Instead, it is used generically to refer to any type of entity (individual, partnership, corporation, or limited liability company). The Act defines the original contractor as 'a person who provides services at the site . . . .' Utah Code Ann. 38-11-102(12). The qualified beneficiary is defined as 'a person who . . . provides qualified services. . . .' Utah Code Ann. 38-11-102(15) Real estate developers and subsequent owners are also defined as 'person[s]'. Utah Code Ann 38-11-102(17) and (19). Clearly, the Act does not restrict teh definition of original contractors, qualified beneficiaries, real estate developers, and subsequent owners to individual only. I [Claimant's attorney] have represented claimants who are

corporations or limited liability companies who have recovered from the Fund. Under that same logic, the owner who occupies a residence can be a legal entity such as a limited liability company. Thus, SYMCO Enterprises, LLC can be an 'owner' of an owner occupied residence.		
In any event, Gary Symkoviak, who is the principal and owner of SYMCO, would certainly qualify as the 'tenant' of SYMCO. SYMCO, as a legal entity, authorized Mr. Symkoviak to occupy the property. In his affidavit, Mr. Symkoviak states that he occupies the property as his secondary residence. Clearly, TBP has satisfied the 'owner occupied residence requirement.' "		
In conference with the AAG, it was determined Claimant's argument may have merit. However, because the claim is fatally flawed (see qualified beneficiary above), the AAG and the Program Coordinator decided to skirt this issue unless the claim is remanded on appeal of denial.		
Residence Single Family/Duplex Yes		
Comments	Page: 001	UserID: ewebster
Per Owner-Occupied Residence affidavit.		
Contract For QS Yes		
Comments	Page: 001	UserID: ewebster
Judgement and lien notice show Claimant provided excavation, concrete installation, plumbing, and other miscellaneous construction activities on the incident residence.		
Claimant brought Civil Action Yes		
Comments	Page: 001	UserID: ewebster
Default judgement in favor of Claimant and against NPP was entered March 14, 1999.		
Exhausted Remedies Yes		
Comments	Page: 001	UserID: ewebster
Claimant issued Supp Order April 11, 2000. Order was served on president/qualifier of NPP April 12, 2000. Claimant was unable to locate assets as a result of Supp Proceeding.		
Adequate \$ in LRF Fund Yes		
Statutory Limit/Payment no		
Comments	Page: 001	UserID: ewebster
Total payments to date for incident residence: \$0		
Exceed Monetary Cap No		
Comments	Page: 001	UserID: ewebster
Total payments to Claimant to date: \$0		
Un-reimbursed Payments no		
Comments	Page: 001	UserID: ewebster

To date Fund has paid \$0 of claims on behalf of Claimant and has received \$0 of reimbursements.

===== PAYMENT CHECKLIST =====

	Apportioned %	Claimed
	100.00	
Principal Amount	8,311.00	8,311.00
Pre Attorney Fees	456.00	456.00
Pre Costs	166.00	166.00
Pre Int. % 0.00	166.00	166.00
Post Attorney Fees	636.00	636.00
Post Costs	16.00	16.00
Post Int. % 0.00	0.00	0.00
Total	10,645.16	10,416.10

QUALIFIED SERVICES COMMENT

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Qualified services amount per judgement.

PRE JUDGEMENT ATTORNEY FEE COMMENT

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Pre-judgement attorney fees per judgement.

PRE JUDGEMENT COSTS COMMENT

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Pre-judgement costs per judgement.

PRE JUDGEMENT INTEREST COMMENT

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Per Utah Code Ann. 38-11-203(3)(c) interest paid at 12% from payment due date to claim approval date net of delays attributable to the claimant.

DATES FOR CLAIM:

Pmt Due Date: August 20, 1999. Claim is silent as to terms of sale; assuming industry norm of N/30 (interest begins this date)

Conditional Denial: Augst 15, 2000 (interest suspended this date)

Claimant Response: September 14, 2000 (interest resumes this date)

Board Hearing: October 11, 2000 (interest terminates this date)

POST JUDGEMENT ATTORNEY COMMENT

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Claimant provided copy of attorney's affidavit of costs & fees. Total post-judgement fees per affidavit: \$636. R156-38-204d(2)(b)(ii) limit for this claim: \$2,000. Fees awarded to amount incurred.

## POST JUDGEMENT COSTS COMMENT

Comments Page: 001 UserID: ewebster

Supp Order service fee.

## POST JUDGEMENT INTEREST COMMENT

## ===== DISPOSITION CHECKLIST =====

CLAIM DENIED: Yes

Amount Denied: 10,416.10

Division Order Date:

Department Order Date:

Appeal Deadline to Dept.:

Appeal Deadline to Courts.:

Status on Appeal: ?

Status on Appeal - CT: ?

AG Subrogation Referral Date:

Date Judgement Assigned to DOPL:

Amount Collected in Subrogation

Costs: 0.00

Fees: 0.00

Interest: 0.00

Civil Penalty: 0.00

Interest: 0.00

Total: 0.00

Status of Subrogation:

Payment Request Date:

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Finet Document Number:

Finance Transaction Date:

NPP Reimbursement Demand Date:

NPP Reimbursement Deadline Date:

Date Reimbursement Received:

Amount: 0.00

Date Investigation Report Updated:

Status of Investigation:

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**BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

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<b>IN THE MATTER OF THE LIEN RECOVERY :</b>	<b>ORDER</b>
<b>FUND CLAIM OF TBP CONSTRUCTION, :</b>	
<b>INC. REGARDING THE CONSTRUCTION BY :</b>	Claim No. LRF-2000-0713-01
<b>JOHN HORN d/b/a ALL SEASONS CABINS, :</b>	
<b>INC. ON THE RESIDENCE OF SYMCO :</b>	
<b>ENTERPRISES, LLC. :</b>	

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Pursuant to the requirements for a disbursement from the Lien Recovery Fund set forth in UTAH CODE ANN. § 38-11-203(3) (1999) and being apprized of all relevant facts, the Director of the Division of Occupational and Professional Licensing finds that the claimant has not complied with the requirements of UTAH CODE ANN. § 38-11-204 (1999).

This claim was filed with the Division on July 12, 2000. On August 14, 2000 the Division issued a Notice of Incomplete or Insufficient Claim Application. That Notice alleged four deficiencies in the claim application and granted the claimant until September 14, 2000 to correct or explain the deficiencies. On September 14, 2000, the claimant filed a timely response to the Division's Notice. A thorough review of that response forms the basis for this order.

Of the four defects cited in the Division's Notice, the most critical is determination of whether the claimant meets the requirements of a "qualified beneficiary." UTAH CODE ANN. § 38-11-204(3) (1999) clearly, albeit implicitly, limits Fund payments to qualified beneficiaries. Therefore, any entity that does not meet the requirements of a qualified beneficiary is ineligible to receive payment from the Fund.

UTAH CODE ANN. § 38-11-102(15) (1999) defines a qualified beneficiary as:

[A] person who:

- (a) provides qualified services;
- (b) pays all necessary fees or assessment required under this chapter; and
- (c) registers with the division:
  - (i) as a licensed contractor under Subsection 38-11-301(1) or (2) if that person seeks recovery from the fund as a licensed contractor; or
  - (ii) as a person providing qualified services other than as a licensed contractor under Subsection 38-11-301(3) if the person seeks recovery from the fund in a capacity other than as a licensed contractor

Clearly, a claimant must do all of the following to be a qualified beneficiary:

1. Provide qualified services
2. Pay all necessary fees
3. Register with the Division as either a contractor or a business entity other than a contractor wishing to participate in the fund

Failure to meet any one of these requirements would prevent the claimant from being a qualified beneficiary and, as such, would preclude the claimant from collecting from the Fund.

At issue in this claim is whether the claimant provided qualified services. The claimant asserts that it provided services as a contractor. UTAH CODE ANN. § 38-11-102(16)(a) (1999) requires, “ ‘Qualified services’ means the following performed in construction on an owner-occupied residence: (a) contractor services provided by a contractor licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act.” (emphasis added). It is critical to note that a contractor must be licensed to meet this definition of qualified services. The claimant alleges, and the documents contained with the claim confirm, it provided “excavating, concrete, installation, plumbing, and other general construction” services during the period June 15, 1999 to July 21, 1999. However, a review of Division records shows the claimant’s contractor license was approved and activated on July 28, 1999. Therefore, the claimant was not licensed at the time the services were performed and, as such, did not provide

“qualified” services. Because the claimant did not provide qualified services, the claimant cannot be a qualified beneficiary and is not entitled to payment from the Fund.

In its response to the Division Notice, the claimant presents two arguments in an attempt to justify its claim for payment of services performed prior to licensure. Claimant’s first argument is that it submitted an Application for Licensure as a contractor sometime in May of 1999. However, because of the high volume of applications at the time, the Division was unable to approve claimant’s application until July 28, 1999. Claimant argues that it should be considered as licensed as of the time the application was submitted not the date the license was approved and activated. This argument fails for a number of reasons. First, UTAH CODE ANN. § 58-55-301(1)(a) (1999) requires:

Any person engaged in the construction trades licensed under this chapter, as a contractor regulated under this chapter . . . **shall become licensed under this chapter before engaging in that trade or contracting activity** in this state unless specifically exempted from licensure under Section 58-1-307 or 58-55-305. (emphasis added)

Clearly the statute requires that a contractor must wait until the license is activated before engaging in construction services. Second, UTAH CODE ANN. § 58-1-301(3) (1997) provides “before any person is issued a license under this title, all requirements for that license as established under this title and by rule shall be met.” The application review process is the Division’s mechanism for ensuring that this requirement is met. To accept the claimant’s assertion that licensure becomes effective upon submission of the application would provide applicants with de facto approval and would circumvent the very purpose for this restriction. Therefore, the claimant cannot be considered as licensed prior to July 28, 1999, and, therefore, cannot be a qualified beneficiary.

The claimant's second argument is that "prior to receiving the license in its own name, TBP was operating under the license of Michael J. Madsen, one of the owners of TBP Construction." The Division agrees that Mr. Madsen was properly licensed during the period the claimant was performing qualified services. However, according to UTAH CODE ANN. § 58-55-501(10) (1999) "unlawful conduct includes . . . allowing one's license to be used by another except as provided by statute or rule." Therefore, the claimant could not legally have been operating under Mr. Madsen's license. Further, the contract for services was between the claimant and the nonpaying party, not between Mr. Madsen and the nonpaying party. As mentioned above, to collect from the Fund the entity providing the services must be licensed. Because the claimant was not licensed, and was operating outside the law, it does not meet the definition of a qualified beneficiary and cannot collect from the Fund.

Having concluded that the claim fails upon this issue, it is not necessary for the Division to rule on the remaining requirements for eligibility. Therefore, the question of whether the other three deficiencies have been corrected is not addressed in this order.

WHEREFORE, the Director of the Division of Occupational and Professional Licensing orders that the above-encaptioned claim is denied.

DATED this 76 day of September, 2000.

  
A. Gary Bowen, Director

**CHALLENGE AFTER DENIAL OF CLAIM:**

Under the terms of UTAH ADMINISTRATIVE CODE, § R156-46b-202(j) (1996), this claim has been classified by the Division as an informal proceeding. Claimant may challenge the denial of the claim by filing a request for agency review. **(Procedures regarding requests for agency review are attached with Claimant's copy of this Order).**

MAILING CERTIFICATE

I hereby certify that on the 28 day of September, 2000, a true and correct copy of the foregoing Order was sent first class mail, postage prepaid, to the following:

TROY PETERSON  
TBP CONSTRUCTION INC  
PO BOX 186  
GARDEN CITY UT 84028-0186

Claimant

BRYAN BOOTH ESQ  
KIRTON & MCCONKIE  
PO BOX 45120  
SALT LAKE CITY UT 84145-0120

Counsel for Claimant

JOHN HORN  
ALL SEASONS CABINS INC  
4614 CREEK VIEW CIR  
SALT LAKE CITY UT 84107-3918

Non-Paying Party

JOHN HORN  
ALL SEASON CABINS INC  
1476 S 700 W  
SALT LAKE CITY UT 84104-1604

Non-Paying Party (alternate address)

WILLIAM THURMAN ESQ  
MCKAY BURTON & THURMAN  
10 E SOUTH TEMPLE STE 600  
SALT LAKE CITY UT 84133-1192

Counsel for Non-Paying Party

Kathie Schwab  
Kathie Schwab, Board Secretary

BRYAN H. BOOTH

**KIRTON &  
McCONKIE**

A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW

1800 EAGLE GATE TOWER  
60 EAST SOUTH TEMPLE  
P.O. BOX 45120  
SALT LAKE CITY, UTAH 84145-0120

FAX (801) 321-4893

TELEPHONE (801) 328-3600

E-MAIL: bbooth@kmclaw.com

October 26, 2000

**By Facsimile 530-6001  
and Hand Delivered**

Douglas C. Borba,  
Executive Director  
Utah Department of Commerce  
Heber M. Wells Building  
160 East 300 South  
P.O. Box 146701  
Salt Lake City, Utah 84114-6701

**RECEIVED**

**OCT 26 2000**

**UTAH DEPT. OF  
COMMERCE**

**RE: LRF Claim No. LRF-2000-0713-01  
Claimant: TBP Construction, Inc.  
Original Contractor: All Seasons Cabins, Inc.  
Non-Paying Party: All Seasons Cabins, Inc.  
Homeowner: SYMCO Enterprises, LLC**

Dear Mr. Borba:

This letter and its enclosures constitute TBP Construction, Inc.'s Request for Agency Review of an Order entered in the present matter on September 26, 2000 by A. Gary Bowen. (A copy of that order is attached as Exhibit "A" for your reference.)

**BACKGROUND**

In 1999, Troy B. Petersen decided that he would like to start his own construction business. (Affidavit of Carmen B. Madsen, which is attached as Exhibit "B," at ¶ 4; the original of this Affidavit will be forwarded to you shortly.) Mr. Petersen took and passed his general contractor's examination and incorporated TBP Construction, Inc. on April 22, 1999. (Exhibit "B" at ¶ 4.) By the middle of May of 1999, Mr. Petersen had applied for his contractor's license, submitted all the necessary documentation, and paid the necessary fees (including the fee for the Residence Lien Recovery Fund). (Exhibit "B" at ¶ 4.) After submitting TBP's application for licensure, Mr. Petersen was approached by several people regarding TBP performing

construction work. Because he had not yet been notified regarding TBP's licensure, Mr. Petersen postponed work on these projects. (Exhibit "B" at ¶ 6.)

The Department of Contractor Licensing was backlogged and the processing of TBP's application was delayed. (Exhibit "B" at ¶ 8.) In early June of 1999, TBP's bookkeeper, Carmen Madsen, placed a telephone call to the Contractor's Licensing Division of the Utah Department of Professional Licensing. The staff member at the Contractor's Licensing Division told Ms. Madsen that TBP's application had been approved and that the license would be mailed out shortly. (Exhibit "B" at ¶ 9.) Ms. Madsen and TBP relied upon this response, and TBP began performing work as a general contractor. This including the work for All Seasons Cabins which is the subject of the current claim. (Exhibit "B" at ¶ 10.)

TBP agreed with John Horn of All Seasons to provide to All Seasons certain excavating, concrete installation, plumbing, and other construction services on a parcel known as Lot 32 of the Sweetwater Park Subdivision #1 in Garden City, Utah (the "Project"). TBP performed the work on the project beginning June 15, 1999 and ending on July 21, 1999. (Notice of Mechanic's Lien, attached as Exhibit "C.") Later, however, when TBP's license was mailed out, the licence showed the date of licensure as July 28, 1999, not the date in early June when Ms. Madsen was told that TBP's application had been approved. (Exhibit "B" at ¶ 12.)

On August 2, 1999, TBP sent out an invoice to John Horn at All Seasons requesting payment of \$8,311.00 for the work performed on the Project. (A copy of that invoice is attached as Exhibit "D.") TBP recorded a notice of mechanic's lien on October 13, 1999. (Exhibit "C.")

When All Seasons failed to pay the amount due, TBP filed an action in the First Judicial District in Rich County against All Seasons and the owner of the Project on November 22, 1999. (Complaint, a copy of which is attached as Exhibit "E.") TBP obtained a default judgment against All Seasons. (Default Judgment, a copy of which is attached as Exhibit "F.") After noticing up a supplemental order hearing (Motion and Supplemental Order, a copy of which is attached as Exhibit "G"), TBP learned that All Seasons had no significant assets with which to satisfy the judgment. TBP learned that the Project was an owner-occupied residence, and that the owner had paid All Seasons in full under a written contract. (Owner Occupied Residence Affidavit, a copy of which is attached as Exhibit "H"). Thus, the owner appeared to be protected by the Residence Lien Restriction and Lien Recovery Fund Act.

On July 12, 2000, TBP submitted an application to the Residence Lien Recovery Fund (the "Fund"). On September 26, 2000, A. Gary Bowen, the Director of the Fund, issued an Order denying TBP's claim. (See Exhibit "A.") Mr. Bowen stated that "a review of Division records shows that claimant's contractor license was approved and activated on July 28, 1999." This is not correct. Although the license may have been printed or mailed out on July 28, 1999,

DOPL informed TBP in early June of 1999 that TBP's licensure application had been approved. Nonetheless, Mr. Bowen ruled as follows:

"[T]he claimant was not licensed at the time the services were performed and, as such, did not provide "qualified" services. Because the claimant did not provide qualified services, the claimant cannot be a qualified beneficiary and is not entitled to payment from the Fund.

(Exhibit "A" at 2-3.) Mr. Bowen ruled that TBP's "claim fails upon this issue . . . ." (Exhibit "A" at 4.)

### ARGUMENT

The critical issue is whether TBP was "licensed" to engage in business as a general building contractor when it performed the services for which it is now seeking payment.

#### **I. TBP WAS LICENSED WHEN IT PERFORMED THE WORK IN QUESTION**

##### **A. TBP Became Licensed Once Its Application Was Submitted and Approved by DOPL**

The Construction Trades Licensing Act ("CTLA") states as follows:

Any person engaged in the construction trades licensed under this chapter . . . shall become licensed under this chapter before engaging in that trade or contracting activity in this state . . . .

UTAH CODE ANN. § 58-55-301. The relevant question is exactly when TBP "became licensed." The CTLA states that "[t]he division shall issue licenses under this chapter to qualified persons in the following classifications: . . . general building contractor . . . ." UTAH CODE ANN. § 58-55-301(c)(2). However, the CTLA does not clarify exactly when an applicant is deemed to have become licensed or what constitutes "issuance" of a license.

The CTLA does provide the following requirements for an entity to become licensed as a general contractor:

- (a) submit an application prescribed by the division;
- (b) pay a fee as determined by the department under Section 63-38-3.2;
- (c) the individual qualifier must pass the required examination if the applicant is a business entity;

- (d) produce satisfactory evidence of financial responsibility
- (e) produce satisfactory evidence of knowledge and experience in the construction industry and knowledge of the principles of the conduct of business as a contractor, reasonably necessary for the protection of the public health, safety, and welfare;
- (f) proof of workers' compensation insurance which covers employees of the applicant in accordance with applicable Utah law;
- (g) proof of public liability insurance in coverage amounts and form established by rule except for a construction trades instructor for whom public liability insurance is not required; and
- (h) proof of registration as required by applicable law with the Utah Department of Commerce, the Division of Corporations and Commercial Code, the Division of Workforce Information and Payment Services in the Department of Workforce Services, the State Tax Commission, and the Internal Revenue Service.

UTAH CODE ANN. § 58-55-302. In May of 1999, TBP submitted the documentation and payments necessary to fully satisfy these requirements. DOPL did not request any additional information or documentation from TBP. Accordingly, once TBP submitted its complete application, it was qualified and eligible for licensure. When DOPL informed TBP in early June of 1999 that TBP's application had been approved, TBP became licensed to engage in work as a general building contractor. Therefore, TBP was properly licensed when it began work for All Seasons on June 15, 1999.

**B. The State Is Estopped From Denying TBP's Licensure During the Relevant Period**

Even if, under the CTLA, TBP was not technically considered licensed until the actual permit was mailed, equitable estoppel precludes the State from denying TBP's licensure for the period between the first part of June, 1999 and July 28, 1999.

**1. *Celebrity Club v. Utah Liquor Control***

The Utah Supreme Court's decision in *Celebrity Club, Inc. v. Utah Liquor Control Commission*, 602 P.2d 689 (Utah 1979), is relevant to the present determination. (A copy of that decision is attached as Exhibit "I" for your reference.) In *Celebrity Club*, the Utah Liquor Control Commission informed Celebrity Club that its proposed building complied with a statute requiring a liquor-distributing establishment to be at least 600 feet from any school. *Id.* at 690-91. Relying upon this statement, Celebrity Club finished the construction on its building. *Id.* at 691. Subsequently, the Liquor Control Commission denied Celebrity Club's application for a liquor license, stating that the building was, in fact, within 600 feet of a school. *Id.* at 692.

Celebrity Club appealed this decision, claiming that the Liquor Commission should be estopped from denying Celebrity Club its liquor license.

On appeal, the Supreme Court of Utah noted the elements of equitable estoppel as applied to the State:

Equitable estoppel may be applied against the State, even when it is acting in a governmental capacity, if necessary to prevent manifest injustice, and the exercise of governmental powers will not be impaired as a result . . .

The elements essential to invoke the doctrine of equitable estoppel are:

- (1) an admission, statement, or act inconsistent with the claim afterward asserted,
- (2) action by the other party on the faith of such admission, statement, or act, and
- (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

*Id.* at 694. The Utah Supreme Court noted that the Liquor Commission “advised as to the appropriate alterations to the premises, which petitioner followed” and that “Petitioner then expended, in reliance upon the representation of the Commission, considerable funds to complete the club facilities . . .” *Id.* at 694-95. The court stated as follows:

The conduct of government should always be scrupulously just in dealing with its citizens; and where a public official, acting within his authority and with knowledge of the pertinent facts, has made a commitment and the party to whom it was made has acted to his detriment in reliance on that commitment, the official should not be permitted to revoke that commitment.

*Id.* at 695.

## **2. *TBP Has Met the Requirements for Equitable Estoppel***

All of the elements necessary for equitable estoppel exist in the present case. First, DOPL made a statement regarding the approval of TBP’s licensure application (i.e. that it was approved as of early June, 1999) which was inconsistent with its subsequent claim about the date of licensure (i.e., that it was not approved until July 28, 1999). Second, TBP relied upon and acted upon the faith of DOPL’s statement by commencing work as a general building contractor. Third, TBP stands to be injured if the State is allowed to contradict DOPL’s statement as to the

Douglas C. Borba  
Utah Department of Commerce  
October 26, 2000  
Page 6

date TBP's application was approved. This injury includes the denial of the present claim before the Fund and the possible inability to collect for other work done between the first part of June, 1999 and July 28, 1999. Fourth, estoppel is necessary to prevent manifest injustice to TBP. If the State is not estopped, TBP stands to lose payment for the services it performed for All Seasons. In addition, TBP may be unable to collect for other construction work completed between the first part of June, 1999 and July 28, 1999. Mr. Bowen's Oder even suggests that TBP may be subject to criminal penalties. Finally, there is no indication that estopping the State in this matter will impair the exercise of any governmental powers relating to contractor licensing or administration of the Fund.

Because all of the requirements for estoppel as outlined in *Celebrity Club* have been met, the State is estopped from denying TBP a general building contractor's license for the period between the first part of June, 1999 and July 28, 1999. As a result, TBP must be considered a "qualified beneficiary" who provided "qualified services" under the Residence Lien Restriction and Lien Recovery Fund Act.

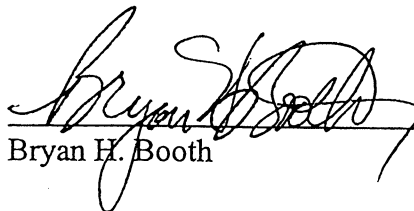
### CONCLUSION

TBP was informed by DOPL that TBP's licensure application had been approved prior to initiating the work for which it now seeks payment. The State is estopped from denying TBP its general building contractor license during the relevant period. Therefore, TBP is a qualified beneficiary who performed qualified services, and is entitled to recover from the Fund.

Based upon the foregoing, the Order of A. Gary Bowen, dated September 26, 2000, should be overturned, and TBP's claim should be processed by the Fund.

Sincerely,

KIRTON & McCONKIE

  
Bryan H. Booth

BHB:wh  
Exhibits "A" through "T"

cc: TBP Construction, Inc.



# State of Utah

## DEPARTMENT OF COMMERCE

Michael O. Leavitt  
Governor

Douglas C. Borba  
Executive Director

Heber M. Wells Building  
160 East 300 South  
P.O. Box 146701  
Salt Lake City, Utah 84114-6701  
(801) 530-6955  
FAX 530-6001  
INTERNET <http://www.commerce.state.ut.us>

October 31, 2000

Bryan H. Booth, Esq.  
Kirton & McConkie  
Attorneys at Law  
P. O. Box 45120  
Salt Lake City UT 84145-0120

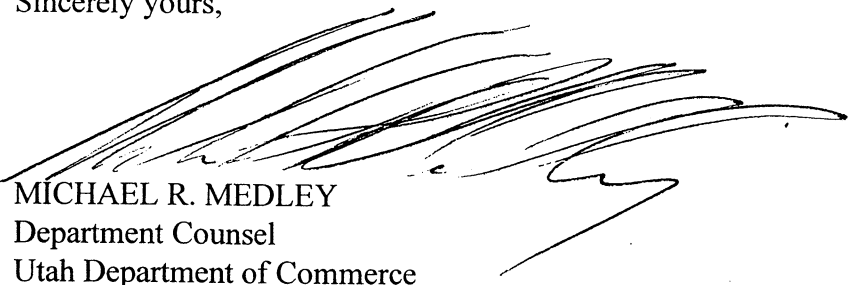
RE: LRF Claim No. LRF-2000-0713-01 (TBP Costruction, Inc.)

Dear Mr. Booth:

We are in receipt of your timely filing of a Request for Agency Review of the adverse decision rendered below. However, your filing does not reflect that you served a copy of the filing on either the division or its attorney, if any was involved in the proceeding [UTAH CODE ANN. § 63-46b-12(1)(b)(iv)].

Although we consider your filing as tolling the statute, the clock will not begin to run on the division's right to respond until the date a copy of the pleadings is sent to it or its attorney.

Sincerely yours,



MICHAEL R. MEDLEY  
Department Counsel  
Utah Department of Commerce

cc: Douglas C. Borba, Executive Director, Utah Department of Commerce  
Earl Webster, Claims Manager, Residential Lien Recovery Fund  
Gary Bowen, Director, Division of Occupational and Professional Licensing  
Tony Patterson, Assistant Attorney General

Bryan H. Booth (#7471)  
KIRTON & McCONKIE  
Attorneys for Claimant  
1800 Eagle Gate Tower  
60 East South Temple  
P.O. Box 45120  
Salt Lake City, Utah 84145-0120  
Telephone: (801) 328-3600

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BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING OF  
THE DEPARTMENT OF COMMERCE OF THE STATE OF UTAH

---

Claimant:

TBP CONSTRUCTION, INC., a Utah  
corporation

**AFFIDAVIT OF CARMEN B.  
MADSEN**

Non-Paying Contractor:

JOHN HORN d/b/a ALL SEASON  
CABINS, INC., a dissolved Utah  
corporation

Claim No. LRF-2000-0713-01

Residence Owner:

SYMCO ENTERPRISES, L.L.C., a Utah  
limited liability company

Claimant's Name:

TBP Construction, Inc.

Claimant's Address:

325 West Logan Road  
P.O. Box 186  
Garden City, Utah 84028

STATE OF UTAH                    )  
                                      : ss.  
COUNTY OF RICH                )

Carmen B. Madsen, being first duly sworn, deposes and says:

1. I am over the age of 21 years of age, have personal knowledge of all matters stated herein, and am in all respects competent to make this Affidavit.
2. My son, Troy B. Petersen, is the president and co-owner of TBP Construction, Inc. ("TBP"). My husband, Michael J. Madsen, is a co-owner of TBP.
3. I often perform clerical and bookkeeping work for TBP.
4. Early in 1999, Troy deciding that he wanted to start his own construction business. Troy took his general contractor's license test in the first part of April, 1999, which he passed. Troy then incorporated TBP Construction on April 22, 1999.
5. By the middle of May, 1999, Troy had applied for his contractor's license, submitted all the necessary documentation, and paid the necessary fees (including the fee for the Residence Lien Recover Fund) for TBP to be licensed as a general contractor.
6. After submitting the application for licensure, Troy was approached by several people regarding TBP performing construction work. Because he had not yet been notified regarding licensure, Troy postponed work on these projects.
7. Several weeks had passed with no word on TBP's license application. Troy was eager to begin working on the projects that had been postponed, so I began calling the Utah

Department of Commerce's Division of Occupational and Professional Licensing ("DOPL") to inquire about the status of the application.

8. In response to my calls, DOPL informed me on more than one occasion that the application was in order but that it still needed to be approved by the auditor, who had a backlog of applications.

9. As the days passed, I continued to call DOPL to check on the status of the application. Finally, in early June, 1999, I called DOPL and was informed that TBP's application had been approved and that the license would be mailed out shortly. I communicated this information to Troy.

10. Upon learning that his application had been approved, Troy began working on construction projects, including the project for All Seasons Cabins.

11. When DOPL told me that TBP's application had been approved, I assumed this meant TBP was authorized to begin to work as a general contractor. No one at DOPL told me that TBP needed to wait until the license was actually mailed out to begin working as a general contractor.

12. Despite its assurances, DOPL did not mail out TBP's license until the end of July. The license stated that it was effective as of July 28, 2000, not the date in early June when I was told that the application had been approved.

Dated this 26<sup>th</sup> day of October, 2000.

Carmen B. Madsen  
Carmen B. Madsen

SUBSCRIBED AND SWORN TO before me this 26<sup>th</sup> day of October, 2000.



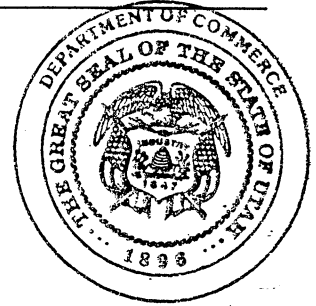
Kathy Hislop  
Notary Public  
Residing in Garden City  
My Commission Expires March 8, 2003

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**BEFORE THE**  
**DEPARTMENT OF COMMERCE**  
**OF THE STATE OF UTAH**

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IN THE MATTER OF THE REQUEST  
FOR AGENCY REVIEW OF

**TBP CONSTRUCTION, INC.**

PETITIONER

: **FINDINGS OF FACT,**  
: **CONCLUSIONS OF LAW and**  
: **RECOMMENDED ORDER**

:

: DOPL Case No. LRF-2000-0713-01

---

**INTRODUCTION**

This matter came on for hearing upon a request for agency review filed by or on behalf of TBP Construction, Inc. (hereafter "Petitioner") seeking to appeal an adverse action taken by the Division of Occupational and Professional Licensing (hereafter "Division") with which Petitioner is aggrieved.

**STATUTES OR RULES PERMITTING OR REQUIRING REVIEW**

Agency review of the Division's decision is conducted pursuant to Section 63-46b-12, Utah Code Annotated, and Rule R151-46b-12 of the Utah Administrative Code.

**ISSUES REVIEWED**

1. Whether the Division erred in finding that Petitioner was not licensed and capable of performing qualified services entitling it to file a valid claim upon the Residential Lien Recovery Fund (hereafter "LRF") during the period for which otherwise compensable services

were performed; or, if not licensed

2. Whether the Division should be estopped from denying that Petitioner was licensed during the period that otherwise qualified services were performed.

## **FINDINGS OF FACT**

1. On September 26, 2000, the Division entered an Order denying Petitioner's claim made upon the LRF for allegedly qualified services on the basis that Petitioner was not a qualified beneficiary under the LRF as it was not licensed when the services were provided.

2. Petitioner filed a timely request for agency review in which it argued that Petitioner had an application for licensure pending at the time the work was performed, and that the delay in licensure was occasioned by delays on the part of the Division in issuing it a license. Petitioner further argued that during the time its license was pending it was informed that the licensure had been approved, and that the license would be mailed out in short order. Petitioner also asserted that either it was licensed to perform qualified services when it did so or, in the alternative, that the Division should be estopped from denying that it was properly licensed due to its reliance upon a representation made by the Division, upon which Petitioner was entitled to rely and did in fact rely to its detriment.

3. The Division argued that Petitioner had failed to properly marshal the evidence from below; that new evidence and issues raised for the first time on appeal should not be contemplated; that the Executive Director lacks jurisdiction to rule on equitable claims; and that Petitioner was incapable of having performed qualified services since not licensed.

## **CONCLUSIONS OF LAW**

1. The case at bar illuminates an inherent weakness in the agency review process. As the Division is always quick to point out - and correctly so - agency review is an appeal on the record made below. However, this forum is repeatedly presented with little in the way of a developed record as one would be offered to an appellate court. Compounding the problem is that consideration of the grant of relief is held to the same strict standards as apply to judicial

appeals. Often the record presented in this forum consists of nothing more than a license denial letter to an applicant offering little more than the deficiency determined to exist by the licensing agency, without the denied party having been given any opportunity to be heard below and present evidence for consideration both below and for the record on appeal.

2. In recognition of the often woefully inadequate record upon which this tribunal is expected to rule, we have adopted an exception to the general exclusion of new evidence on appeal in reviews of informal proceedings. In support of this exception we have repeatedly held over the years that, for the sake of justice and judicial economy, new evidence submissions will be reviewed and, if it appears that such information might have altered the decision had it been made known to the lower tribunal, we will remand a case back to the Division for further consideration to include the new evidence.

3. The Petitioner in this case has pursued two alternate theories in its attempt to recover. The first theory presented below was that the performed work was valid and qualified for a LRF claim, since one of the principals of the Petitioner was a licensed contractor who would have been able to perform the work and perfect a LRF claim under his own license.

4. The theory that Petitioner was validly working under the license of another was abandoned on this appeal in favor of an assertion that an unidentified employee of the Division informed a relative of two principals of Petitioner that its license had been approved. Petitioner claimed that the representation occurred on a date prior to its entry into the contract and its performance of services for the defaulting party, thus causing reasonable detrimental reliance by Petitioner which would estop the Division from questioning its licensing status and presentation of itself as a qualified beneficiary for LRF claim purposes. Petitioner cites as its sole authority for the application of equitable estoppel upon the case at bar the Utah Supreme Court case of *Celebrity Club, Inc. v. Utah Liquor Control Commission*, 602 P.2d 689 (Utah 1979).

5. *Celebrity Club* revolved around a new statute containing an apparent ambiguity. The business in *Celebrity Club* was a poster child for due diligence, and did everything right: it sought and received administrative guidance from the appropriate enforcement officials; it obtained an opinion from the agency charged with enforcing the statute; and it received an express written assurance that the business was in compliance with the requirements of the

statute. Relying upon the experts, the business proceeded to expend some \$200,000 on the project. In determining that equitable estoppel should apply, the Court quoted with approval a case from the State of Washington:

The doctrine of equitable estoppel is properly applicable in a case such as this, otherwise the whim of an administrative body could bankrupt an applicant who acted in good faith in reliance upon a solemn written commitment. [quoting *State v. Sponburgh*, 401 P.2d 635 (Washington 1965)]. *Celebrity Club, Inc. v. Utah Liquor Control Comm'n*, 602 P.2d 689, 695 (Utah 1979).

6. The Division vigorously argued that this tribunal does not possess the authority to consider Petitioner's issue of equitable estoppel, citing *Avis v. Board of Review of the Industrial Commission*, 837 P.2d 584 (Utah App. 1992) and *Bevans v. Industrial Commission*, 790 P.2d 573 (Utah App. 1990). These cases are distinguishable from the case at bar. In *Bevans* an award to a worker was reduced without any express or implied statutory grant of discretionary authority, with the intent of making the result what the agency deemed to be a fair adjustment, a clear invasion into the province of equitable jurisdiction. In *Avis* the Court reiterated that constitutional challenges cannot be addressed by an administrative agency as it is not a court of general jurisdiction.

7. In the case at bar, Petitioner neither seeks a ruling on the constitutionality of any statute nor seeks an equitable resolution outside of the statutory authority possessed by this forum. Rather, the issue attempted to be argued by Petitioner is akin to cases in which the issue of fundamental fairness in a proceeding below is raised on appeal. While this tribunal is not a court of general jurisdiction capable of addressing the constitutionality of statutes assigned to the Division for implementation, we are able to rule on whether procedures by the Division comport with due process standards. This tribunal is not a court of equity and cannot "do equity" in a case unless discretionary authority to do so is granted by statute. In this case, however, Petitioner is merely asking that we apply a legally recognized doctrine to facts which existed below.

8. The Division's position that an administrative agency cannot consider the issue of equitable estoppel does not appear to be shared by the Utah Court of Appeals. In *O'Keefe v. Utah State Retirement Board* [929 P.2d 1112 (Utah App. 1996)], involving a claim of equitable

estoppel, the Court approved a finding made by the administrative hearing officer that the aggrieved party had not established equitable estoppel, based upon reasonable reliance, as the proof had not risen to the level necessary to prevail against a state agency. The Court designated the standard of review as being:

"In the absence of an express or implied grant of discretion to an agency to interpret statutory language, this court reviews an agency's statutory construction as a question of law under a correction-of-error standard." (citation omitted). Because the statute in question contains no express or implied statutory grant of discretion to the agency, we review the Board's interpretation for correctness. . . . **We review the Board's determination on the issue of equitable estoppel for correctness, affording a degree of deference to the agency.** Finally, resolution of petitioner's claim of interference with contract requires us to assess the statutory authority of the Board and is thus a question of law which we review for correctness. (Citations omitted). (Emphasis added). (at 1114-1115).

9. The doctrine of equitable estoppel is invoked by the introduction of proof of three essential core elements, all of which must be established by competent evidence:

(1) a party's statement, admission, act, or failure to act that is inconsistent with a later-asserted claim;

(2) reasonable action or inaction by a second party, taken on the basis of the first party's statement, admission, act, or failure to act;

(3) injury to the second party resulting from allowing the first party to repudiate its statement, admission, act, or failure to act. (Citations omitted). *Mendez v. Utah Dep't of Social Services*, 813 P.2d 1234 (Utah App. 1991).

10. Equitable estoppel requires two additional core elements to be proven before the doctrine may be invoked against a governmental entity operating in a non-proprietary mode.

The exception to this rule becomes operative when (1) necessary to prevent manifest injustice; and (2) the exercise of governmental powers will not be impaired as a result of the application of estoppel. . . . The elements of "manifest injustice" and "no impairment of governmental powers" . . . must also be established . . . . *Mendez v. Utah Dep't of Social Services*, 813

P.2d 1234 (Utah App. 1991).

11. The general rule on the application of equitable estoppel in Utah, as set forth by the Utah Supreme Court, is that:

... estoppel may not be invoked against a governmental entity. In Utah, there is a limited exception to this general principle for "unusual circumstances 'where it is plain that the interest of justice so require'". This exception applies, however, only if "the facts may be found with such certainty and the injustice suffered is of sufficient gravity, to invoke the exception. (Citations omitted). *Anderson v. Public Service Comm'n*, 839 P.2d 822 (Utah 1992).

12. In the period between *Celebrity Club* in 1979 and *O'Keefe* in 1996, our appellate courts have considered the issue of equitable estoppel on several occasions. The two this forum finds most compelling are *Eldredge v. Utah State Retirement Bd.*, 795 P.2d 671 (Utah App. 1990) and *Anderson v. Public Service Comm'n*, 839 P.2d 822 (Utah 1992), as they bracket the issue presented in this case.

13. In *Eldredge* the party asserting estoppel, a county employee, sought clarification of an article appearing in the county bulletin regarding retirement benefits. Pursuant to the instructions in the bulletin, Eldredge contacted the retirement office and received a letter confirming that he had sufficient credited years to retire with an income adequate to meet his needs. In reliance upon the express written representations of the agency responsible for determining and paying out retirement benefits, Eldredge retired. After commencing retirement payments at the rate represented by the agency and upon which Eldredge had relied in retiring, the agency informed Eldredge that they had been wrong and he would either have to pay almost \$34,000 or else have his retirement benefit cut to an amount upon which he could not live.

14. The Court determined upon the facts that Eldredge had established the three core elements necessary to enable him to invoke the doctrine of equitable estoppel, which was all that was required since the agency was acting in a proprietary - rather than governmental - capacity. The Board set up his retirement, he relied upon the Board's expertise and had a right to so rely, and he gave up his employment which he was unable to recover. The Court determined that to allow the Board to disallow its express representations to Eldredge would be manifestly unjust,

whereas imposition of estoppel would not unduly threaten or damage the public interest. The Court added the proviso that:

... the courts must be more cautious in applying equitable estoppel against the State when it is functioning in a governmental, as opposed to a proprietary, capacity. Here, the Board was exercising a proprietary function, so less caution is required. "It must be remembered that when the State functions in its proprietary capacity, it will receive no better treatment than any two private individuals who bring their dispute before the court for final resolution." (Citations omitted). *Eldredge v. Utah State Retirement Bd.*, 795 P.2d 671 (Utah App. 1990).

15. In *Anderson, supra*, Anderson claimed on appeal that his certification issued by a governmental agency had been revoked while settlement negotiations were ongoing, and that certain representations had been made by the agency to him which should have estopped the agency's action. The Court determined that Anderson's claim failed "because it does not meet the high standard of proof required for estoppel against the government (*Anderson*, at 16). The Court then discussed the various cases in which estoppel had been permitted in Utah and stated:

The few cases in which Utah courts have permitted estoppel against the government have involved very specific written representations by authorized government entities. . . . These cases involved very clear, well-substantiated representations by government entities. (*Anderson*, at 17-18).

16. It is very clear from a fair reading of all of the Utah cases considering the issue, that before estoppel can even be considered against a governmental agency the party raising it must clear some very exacting hurdles, and the facts establishing the claim of estoppel must be extremely compelling for relief to be granted. Although the courts do not expressly state the burden of proof required as exceeding a preponderance, it is clear from their language that the representations relied upon by the party claiming estoppel must approach being both indisputable and undisputed in order to prevail.

17. Although the Division is eminently correct in its assertion that an administrative agency cannot ignore the statutes in order to reach an equitable result, that is not the issue before us in this case. Petitioner alleged that its employee was informed by a Division employee that its

application to act as a contractor in the State of Utah license had been approved, and that it could expect its license to be mailed in a short period. Therefore, the issue more properly is not what would be an equitable result, but rather: At what point does an application become a license to act in the occupation or profession for which licensure is sought? and, Would the facts in this case prevent the Division from denying that Petitioner was licensed?

18. Petitioner has presented on this appeal, apparently for the first time, an affidavit from Carmen B. Madsen, the wife of one and mother of another of Petitioner's principals, who assists in the activities of the business. The affiant stated that she called the Division on a number of occasions after the filing of Petitioner's application for a contractor license in May, 1999, to inquire about the progress of the application. She avers that she was told in early June, 1999, that Petitioner's application had been approved and the license would be mailed out shortly. Upon this alleged notice, Petitioner commenced business as a contractor and entered into the defaulted contract which was the subject matter of the LRF claim.

19. The Division countered Petitioner's affidavit with one of its own, executed by the auditor who handled the application, A. Bowen Call. Mr. Call stated that Petitioner filed a complete and fully documented application on May 13, 1999. The required audit of the financial documentation was completed and the license issued on July 28, 1999.

20. The issue in this matter - other than estoppel, which will be rejoined below - is one of when Petitioner's license became effective. Accepting, *arguendo*, that both of the submitted affidavits are correct on the facts, a resort to the applicable statutes is necessary in order to attempt to formulate an answer. In reading the licensing act:

... we begin with the statutes' plain language. We will resort to other methods of statutory interpretation only if we find the language of the statutes to be ambiguous. (Citations omitted) . . . . In doing so, we rely on two well-established rules of statutory construction. . . . First, specific statutory provisions take precedence over general statutory provisions. Second, statutory provisions should be construed to give full effect to all of their terms. (Citations omitted). *State v. Vigil*, 842 P. 2d 843, 845 (Utah 1992).

21. In order to recover from the LRF, the claimant entity must be a qualified

beneficiary who, pursuant to the requirements of UTAH CODE ANN. §38-11-102(15):

- (a) provides qualified services;
- (b) pays all necessary fees or assessment required under this chapter; and
- (c) registers with the division:
  - (i) as a licensed contractor under Subsection 38-11-301(1)
  - or (2) if that person seeks recovery from the fund as a licensed contractor; . . . .

22. The licensing act mandates licensure as a contractor as a prerequisite to engaging in non-exempt contracting activity [§58-55-301(1)(a)], and the LRF act provides that in order for services to be "qualified services" they must be performed by "a contractor licensed or exempt from licensure" [§38-11-102(16)(a)]. To become licensed as a contractor in the State of Utah, an applicant must comply with the provisions of the licensing act, UTAH CODE ANN. §58-55-302, and the licensing act rules, UTAH ADMIN. R156-55a-302a *et seq.*

23. The licensing act does not allow an applicant to become licensed upon the mere filing his application, regardless of how complete or how well documented. An applicant cannot even be conditionally approved for a license until the Division has completed its review, which includes an auditing for financial responsibility, knowledge, and experience [§58-55-302(1)(e)(i and ii)]. Even after initial approval, the license cannot be granted until a number of other prerequisites are met. The language is clear and unambiguous that even "after approval of an applicant" an applicant still does not become licensed until all of the requirements are met and "the division issues the license" [§58-55-302(2)].

24. The term issue denotes a physical delivery. In legal parlance, used as a verb "issue" means:

To send forth; to emit; to promulgate; . . . To send out officially; to deliver, for use, or authoritatively; to go forth as authoritative or binding . . . ordinarily construed as importing delivery to the proper person . . . . [w]hen . . . delivered . . . they will be issued. . . .

As a noun "issue" is legally defined as:

The act of issuing, sending forth, emitting or promulgating; the giving a thing its first inception; as the issue or an order or a

writ. BLACK'S LAW DICTIONARY 830-831 (6<sup>th</sup> ed. 1990).

25. The general and specific statutes leave no doubt that "license", as used in the licensing act, contemplates a tangible document capable of being physically possessed, *e.g.* "Each license automatically expires on the expiration date shown on the license . . . ." [UTAH CODE ANN. §58-55-303(3)]. Petitioner did not become licensed until the license was issued by the Division on July 28, 1999, and must seek comfort, if any, under its theory of estoppel.

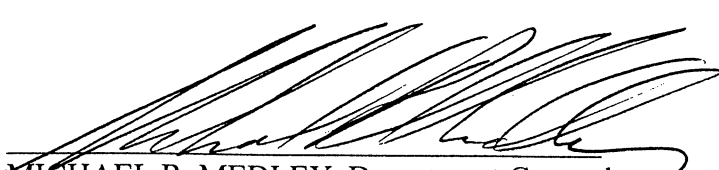
26. Ignoring the Division's challenge of whether this forum is entitled to consider evidence submitted by Petitioner for the first time on appeal, and further disregarding the Division's assertion that this forum is legally proscribed from granting any relief even should it be found that Petitioner relied upon the alleged representation of an allegedly unauthorized Division employee, there is simply a paucity of facts available upon which a finding for Petitioner could be sustained upon the present record.

27. "It is well settled that equitable estoppel is only assertable against the State or its institutions in unusual situations in which it is plainly apparent that failing to apply the rule would result in manifest injustice." *O'Keefe v. Utah State Retirement Bd.*, 929 P.2d 1112 (Utah App. 1996). This forum simply does not have a record which would support a grant of relief.

### RECOMMENDED ORDER

**ORDERED** that the decision of the Division of Occupational and Professional Licensing denying the Residential Lien Recovery Act claim of TBP Construction, Inc. should be and the same is hereby affirmed.

Dated this the 13<sup>th</sup> day of December, 2000.

  
MICHAEL R. MEDLEY, Department Counsel  
Utah Department of Commerce

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**BEFORE THE  
DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

---



IN THE MATTER OF THE REQUEST : **ORDER ON REVIEW**  
FOR AGENCY REVIEW OF :  
TBP CONSTRUCTION, INC. : DOPL Case No. LRF-2000-0713-01  
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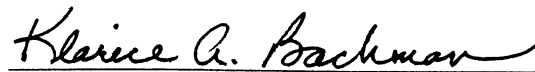
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**ORDER**

The Findings of Fact, Conclusions of Law and Recommended Order in this matter are ratified and adopted by the Executive Director of the Department of Commerce and it is, therefore

**ORDERED** that the decision of the Division of Occupational and Professional Licensing denying the Residential Lien Recovery Act claim of TBP Construction, Inc. should be and the same is hereby affirmed.

**SO ORDERED** this the 14<sup>th</sup> day of December, 2000.



KLARICE A. BACHMAN, Interim Executive Director  
Utah Department of Commerce

## NOTICE OF RIGHT TO APPEAL

Judicial review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order on Review. Any Petition for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-15, Utah Code Annotated. In the alternative, but not required in order to exhaust administrative remedies, reconsideration may be requested pursuant to *Bourgeois v. Department of Commerce, et al.*, 981 P.2d 414 (Utah App. 1999) within 20 days after the date of this Order pursuant to Section 63-46b-13.

## CERTIFICATE OF MAILING

I certify that on the 14/12 day of December, 2000, the undersigned mailed a true and correct copy of the foregoing Order on Review by certified mail, properly addressed, postage prepaid, to:

Bryan H. Booth, Esq.  
Kirtan & McConkie  
Attorneys at Law  
P. O. Box 45120  
Salt Lake City UT 84145-0120  
ATTORNEY FOR TBP CONSTRUCTION, INC.

and caused a copy to be hand-delivered to:

Gary Bowen, Director  
Division of Occupational and Professional Licensing  
160 East 300 South, 4<sup>th</sup> Floor  
Salt Lake City, Utah 84111

Tony R. Patterson, Esq.  
Assistant Attorney General  
Office of the Attorney General  
160 East 300 South, 5<sup>th</sup> Floor  
Salt Lake City, Utah 84111



MICHAEL R. MEDLEY, Department Counsel  
Utah Department of Commerce